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Supreme Court, U.S.
FILED
NOV 13 2002
OFFICE OF THE CLERK

No. 01-1420

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, ET AL.,

Petitioners,

V.

GUARDIANSHIP ESTATE OF DANNY KEFFELER, BY WANDA PIERCE, GUARDIAN, AND OTHER PERSONS SIMILARLY SITUATED,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

REPLY BRIEF FOR THE PETITIONERS

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A. Introduction And Summary

This case is about one question and one question only: Whether the Washington State Department of Social and Health Services (Department or DSHS), as representative payee, violates 42 U.S.C. § 407(a) when it uses social security benefits to pay for a beneficiary's current care. That is the question on which this Court granted certiorari. Cert. Pet. at i. Contrary to respondents' claim, it is quite obviously the question decided by the Washington Supreme Court: "We hold DSHS as representative payee violates § 407(a) when it applies Social Security benefits to the current maintenance needs of foster children[.]" App. Pet. at 2. And that holding is the entire basis for the decision below.

This holding by the Washington Supreme Court is incorrect. Social security statutes and regulations explicitly authorize representative payees to use benefits to pay for a beneficiary's current care. Pet'r Br. at 21-23. The anti-alienation provision of § 407(a) does not prohibit what these statutes and regulations permit. Instead, § 407(a) is limited to compulsory or coercive processes and thus has no application to voluntary decisions by duly designated payees to use benefits in a manner specifically approved by regulation. Pet'r Br. at 23-30.

In this Court, respondents abandon the decision and reasoning of the Washington Supreme Court. Respondents disclaim the express holding of the court below, suggesting in a footnote that the Washington Supreme Court may have misspoken when it announced its holding. Resp't Br. at 17 n.14. They now agree that representative payees may use social security benefits to pay for current

maintenance. Resp't Br. at 1. And they disavow any claim that federal social security benefits must add to, rather than replace, state assistance (Resp't Br. at 37 n.28)— the very premise of the decision below. App. Pet. at 18 (under proper application of § 407(a), "the child's SSI will be available to benefit the child *in addition* to the state-funded foster care program") (emphasis added).

Having abandoned the actual decision below, respondents are left to argue about accounting procedures. Respondents appear to claim that DSHS violates the Social Security Act because it uses an accounting system that pays for care first and later uses social security benefits to reimburse the cost of that care. But, of course, nothing in the Act or its implementing regulations prescribes any particular accounting procedure, or prohibits the one selected by DSHS. Respondents also claim now that DSHS does not, in fact, use the benefits in question to pay for current maintenance—a point the court below never doubted, and one well outside both the holding below and the question presented to this Court. In any event, respondents are wrong, and their claim misconstrues both Washington law and the record.

B. The Department's Use Of Benefits To Pay For Current Maintenance Does Not Violate § 407(a)

1. Section 407(a) provides that social security benefits shall not "be subject to execution, levy, attachment, garnishment, or other legal process". Respondents claim that the Department's use of benefits as representative payee constitutes prohibited "other legal process". The United States argues persuasively that "other legal process" is limited to *judicial* process. Br. United States Amicus

Curiae at 21-22. Some lower courts have held that the term also extends to other efforts to obtain benefits through coercion. *See* Pet'r Br. at 23-24. But as even respondents appear to concede, "legal process" must, at a minimum, involve the kind of compulsion inherent in the other forms of process specified by § 407(a)—levy, execution, attachment, and garnishment. Resp't Br. at 39 (relying on agency definition of "legal process" to include "compel[led] compliance").

The Court need not resolve in this case whether "other legal process" is limited to judicial process, because respondents cannot satisfy even the broader definition that they endorse. The Department's use of benefits to pay for current maintenance is entirely voluntary and involves no "compelled compliance" or coercion of any sort. The Social Security Administration (SSA) sends the Department the benefits, and the Department, as authorized representative payee, uses the funds in its possession in accordance with social security regulations. There is no coercion or compulsion anywhere in this picture.

Respondents' argument to the contrary seems to rest on the premise that the Department is "required", under Washington law, to "seize" benefits for its own reimbursement. Resp't Br. at 38, 39. Simply labeling the process by which the Department uses funds in its own possession as a "seizure"—or, for that matter, a "scheme" (*see* Resp't Br. at 40)—does not bring it within the terms of § 407(a). But in any event, the claim that Washington law requires the Department to reimburse itself for the cost of foster care misstates Washington law and is directly refuted by the record.

Respondents appear to rely for this point on Wash. Rev. Code § 74.13.060, discussed elsewhere in their brief. Resp't Br. at 6, 22. But that statute expressly grants substantial discretion to the Secretary of DSHS when acting as representative payee. First, the Secretary may disburse benefits "for such personal needs of such person as the secretary may deem proper and necessary". Wash. Rev. Code § 74.13.060(1). Second, the "secretary *may* apply such funds against the amount of public assistance otherwise payable to such person". Wash. Rev. Code § 74.13.060(2) (emphasis added). Reimbursement is not mandatory, but rather discretionary with the Secretary.[1]

Respondents' argument also is inconsistent with the record in this case, which proves that the Department does forgo reimbursement for foster care and uses social security benefits for special needs. App. Pet. at 56-58, ¶ 30-37. JA at 139-140, ¶ 9-10; 149-180; 195, ¶ 11. Using benefits for special needs must be approved by the Trust Fund Unit of the Department. JA at 57, ¶ 31. However, the standard for approving such expenditures is not the impact on DSHS's budget, but rather "direct benefit" to the beneficiary. JA at 57, ¶ 33.

[1] Respondents also point to Wash. Admin. Code § 388-25-0210 to support their claim that the Department "must" use the benefits to pay for foster care. Resp't Br. at 26. But Wash. Admin. Code § 388-25-0210(1) provides that the use of funds is limited "by the terms and conditions of the receipt of the income". Social security benefits received by the Department must be used in accordance with social security statutes and regulations. Respondents' reading of this rule is also inconsistent with the discretion granted the Secretary in Wash. Rev. Code 74.13.060(1) and (2), and the Department's actual practices, which establish that the Department uses benefits for both current maintenance and special needs.

In sum, the premise for respondents' argument that the Department is "seizing" social security benefits and thus violating § 407(a) is false. State law does not mandate reimbursement, and the Department properly exercises the discretion appropriate to a representative payee.

2. Like the court below, respondents rely heavily on *Philpott v. Essex County Welfare Board*, 409 U.S. 413 (1973), and *Bennett v. Arkansas*, 485 U.S. 395 (1988), for the proposition that § 407(a) bars the use of social security benefits to pay for current maintenance. App. Pet. at 20-21; Resp't Br. at 40-42. But as we already have shown, those cases have no bearing here. In neither of those cases was the state a representative payee. Therefore, in both, the state was required to undertake the kind of formal judicial process (a lawsuit in *Philpott* and a court attachment action in *Bennett*) that is obviously covered by the terms of § 407(a). Pet'r Br. at 24-25.

Respondents' argument boils down to the claim that the *effect* of the Department's accounting system on the beneficiary is the same as if the Department had used formal judicial process to attach benefits, in the manner barred by § 407(a) and condemned in *Philpott* and *Bennett*. In other words, the Department will pay out fewer state dollars for foster care because it uses social security benefits to pay for this care, just as if the state had legally attached or garnished the benefits. Resp't Br. at 40-41. This argument ignores the discretion the Department exercises in carrying out its duties as representative payee. Moreover, this approach proves far to much. Even respondents do not and cannot argue that either § 407(a) nor any other provision of federal law would bar DSHS from

transferring the entire social security benefit directly to the foster parent, and then separately reducing its own monthly foster care payment by exactly the same amount. *See* Resp't Br. at 37 n.28; *see also* Br. United States Amicus Curiae at 28.[2] But under respondents' "effect" theory, that system, too, would run afoul of *Philpott* and *Bennett* by using social security benefits to relieve the state of foster-care costs it otherwise would bear.

The answer, of course, is that neither § 407(a) nor *Philpott* and *Bennett* stand for the sweeping proposition suggested by respondents. They simply prohibit the state—or any other party—from using compulsory process to gain access to social security benefits. When, as here, the state as representative payee is already in possession of the benefits and uses them for authorized purposes, they have no application at all. Simply put, the process is voluntary, not compulsory.

3. Respondents mistakenly rely on 42 U.S.C. § 407(b) to support their case. Section 407(b) provides that no other provision of law modifies § 407(a) "except to the extent it does so by express reference

[2] This proposition is well-established by the case law. *See, e.g., Sullivan v. Stroop*, 496 U.S. 478 (1990) (aid provided under Aid to Families with Dependent Children program may be reduced by amount of Title II benefits); *Hurd v. Illinois Bell Tel. Co.*, 136 F. Supp. 125, 142 (N.D. Ill. 1955), *aff'd*, 234 F.2d 942 (7th Cir. 1956), *cert denied sub nom Seybold v. Western Elec. Co.*, 352 U.S. 918 (1956) (offsetting social security benefits against employer's pension plan does not violate § 407(a)); *Lamb v. Connecticut Gen. Life Ins. Co.*, 643 F.2d 108 (3rd Cir. 1981), *cert denied*, 454 U.S. 836 (1981) (same); *Rosa v. Warner Elec. Contracting*, 870 P.2d 1210 (Colo. 1994), *cert denied*, 513 U.S. 814 (1994) (reducing state workers compensation benefits by amount of social security benefits does not violate § 407(a)).

to this section". App. Pet. at 170. According to respondents, since 42 U.S.C. § 405(j)—authorizing the appointment of representative payees—does not expressly mention § 407(a), § 407(a) does not have any exception for representative payees. Resp't Br. at 34.

This argument misconstrues the Department's position. First of all, DSHS is not seeking an "exception" to § 407(a). The Department needs no exception because, by its terms, § 407(a) does not prohibit what the Department is doing. Second, the Department does not claim that § 407(a) can never be applied to a representative payee.[3] Rather, § 407(a) does not prohibit a representative payee—appointed by the Commissioner pursuant to § 405(j)—from using the benefits in accordance with the social security regulations.

Section 407(b) does not require a different result. Indeed, the purpose of § 407(a) is consistent with the purpose of § 405(j). The purpose of anti-alienation statutes such as § 407(a) is to preserve benefits so they can be used to support the beneficiary. *Porter v. Aetna Casualty & Surety Co.*, 370 U.S. 159, 162 (1962) (the purpose of the anti-alienation provision protecting veterans benefits is

[3] Like a beneficiary, a representative payee may be subject to § 407(a). For example, in *Boulter v. Boulter*, 930 P.2d 112 (Nev. 1997), the state court ruled that § 407(a) prohibited a court from enforcing an agreement by a beneficiary husband to pay half of his social security benefits to his former wife. Section 407(a) would also prohibit judicial enforcement of such an agreement if made by a representative payee. However, § 407(a) does not prohibit a beneficiary or a representative payee—who is acting within the social security regulations—from spending benefits after they are received.

to "protect funds granted by the Congress for the maintenance and support of the beneficiaries thereof"); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 584 (1979) (the purpose of the anti-alienation provision protecting railroad retirement benefits is to "ensure[] that the benefits actually reach the beneficiary"). This purpose is consistent with § 405(j) and the implementing regulations. Section 405(j) requires the representative payee to use social security funds for the benefit of the beneficiary. Social security regulations provide that it is in the best interest of the beneficiary to use the benefits for current maintenance. 20 C.F.R. § 404.2040(a)(1).

Sections 407(a) and 405(j) have coexisted in the social security law for over 60 years. Section 407(a) was originally enacted in 1935. Aug. 14, 1935, ch. 531, Title II, § 208, 49 Stat. 625. Section 405(j) was enacted in 1939. Aug. 10, 1939, ch. 666, Title II, § 205(j), 53 Stat. 1372. And § 407(b) was not enacted to prevent a representative payee from using the benefits to pay for the beneficiary's current care. It was enacted to overturn court decisions that did not apply § 407(a) and, instead, authorized coercive legal process to take social security benefits away from the beneficiary. *See* H.R. Conf. Rep. No. 98-47, 98th Cong. 1st Sess. 115, 153, *reprinted in* 1983 U.S.C.C.A.N. 404, 443 ("some bankruptcy courts have considered social security and SSI benefits . . . to be income . . . and have ordered SSA . . . to send all or a part of the debtor's benefit check to the trustee in bankruptcy.").

4. There is no merit to respondents' argument that the Department violates § 407(a) by taking future social security benefits into account in its budgeting process. According to respondents, the

state budgeting process constitutes an "assignment" of benefits prohibited by § 407(a). Resp't Br. at 43. But attaching the label "assignment" does not make it so, and the state's budget is simply a forecast of the dollars needed to operate the program, not an assignment of benefits. Nor, as discussed above, B.2 *supra* pp. 5-6, is there any reason why a state may not take federal social security benefits into account in setting its budget. The process respondents describe is no different from a parent taking into account the family's resources, including social security benefits, in making the yearly budget for the family—except, instead of one or two children, the Department is responsible for thousands of foster children.

C. The Department's Use Of Benefits Does Not Violate § 405(j)

1. Respondents' claims regarding § 405(j) are not properly before this Court. Respondents, in their opposition to certiorari, objected at length to petitioners' formulation of the question presented. *See* Cert. Opp. i. Fully apprised of their concerns, the Court nevertheless granted certiorari, without modification, of the question presented by petitioner: "Does a representative payee violate 42 U.S.C. § *407(a)* when the payee uses the benefits to pay for he beneficiary's current care?" Cert. Pet. at i (emphasis added). There is no reason in this case for the Court to depart from its policy of addressing only those questions on which it has granted certiorari. *See* Rule 14.1(a). *See also* Robert Stern, *et al., Supreme Court Practice* 420 (8th ed. 2002) (to "allow a petitioner, or a respondent, to argue other questions would subvert the theory underlying the certiorari process"); *Irvine v. People of*

California, 347 U.S. 128, 129 (1954) (refusing to consider additional questions argued by petitioner in merits brief).

Indeed, a departure here would be especially unfortunate. Were the Court to consider respondents' § 405(j) claim now, it would have to do so without the benefit of a lower court's analysis and ruling. The Washington Supreme Court's decision rests on § 407(a), not § 405(j): what respondents call an "express[ion]" of "doubt" about whether DSHS's system complies with certain SSA regulations (Resp't Br. at 30), does not constitute a holding on respondents' new statutory claim.[4] That makes this case a particularly poor vehicle for addressing a claim that falls outside the questions presented. *See* Stern, at 420 ("injecting new issues into the case at this stage deprives the Justices of the benefit of the lower court's refinement and resolution of the issue").

2. In any event, there is no merit to respondents' claim that the Department's accounting system that provides for reimbursement violates § 405(j). The gist of respondents' argument is that using benefits to pay for current maintenance violates the regulatory mandate that benefits be used "in the best interests" of the beneficiary. Resp't Br. at 20-22. As we explained in our opening brief, however, § 405(j) and governing SSA regulations

[4] The fact that the lower court did not rule on respondents' § 405(j) claim is not surprising, given that respondents did not raise it clearly below. Neither respondents' complaint nor their amended complaint alleged a violation of § 405(j). They only alleged a violation of § 407(a). JA at 17, ¶ 4.8; 113, ¶ 4.8. And although respondents discussed the regulations promulgated under § 405(j) in a supplemental brief before the Washington Supreme Court, that discussion appeared as support for their § 407(a) argument, not as a stand-alone claim.

expressly *permit* representative payees to use benefits to pay for a beneficiary's current care. Pet'r Br. at 21-22.

As a duly-appointed representative payee for foster children in its care, the Department is authorized by social security regulations to use benefits exactly as it does—to pay for such items as food, clothing, and shelter for the beneficiary. The regulations clearly specify that payments used for such purposes constitute "current maintenance", and that "current maintenance" payments are deemed to be for the "use and benefit" of the beneficiary. 20 C.F.R. § 404.2040(a)(1). Moreover, use of benefits for current maintenance is by regulatory definition in the "best interests" of the beneficiary: "Benefits certified to a representative payee are considered to be used in the beneficiary's best interest if they are used for a beneficiary's current maintenance." 47 Fed. Reg. 30,468, 30,470 (1982).

But respondents and the court below take a different view of "best interests" than the SSA. According to respondents and the Washington Supreme Court, payments made for current maintenance can never be in the "best interests" of the beneficiary when the same maintenance would otherwise be provided to the beneficiary by the state at no charge. Resp't Br. at 22, 30; App. Pet. at 28. That position is untenable, for two reasons.

First, as discussed above, it is inconsistent with case law holding that a state may offset the amount of public assistance it provides by the amount of a beneficiary's social security benefits, a point respondents do not and cannot dispute. *See* B.2 *supra* pp. 5-6; Resp't Br. at 37 n.28. The practical effect on the beneficiary of such an "offset"

is precisely the effect complained of here: Instead of receiving federal benefits in addition to state support, the beneficiary's social security benefits reduce some portion of what otherwise would be state assistance. If the "offset" method of accounting for federal benefits is fully permissible, then it would elevate form over substance to say that the reimbursement method employed by DSHS, identical in practical consequence, somehow violates the "best interests" standard.

Second, respondents and the Washington Supreme Court are not entitled to substitute their view of what constitutes the "best interests" of beneficiaries for that of the SSA. Pet'r Br. at 31-34. The SSA's position, set out in the regulatory material described above, is that payments for current maintenance are necessarily in the "best interests" of the beneficiary. And the SSA Rulings discussed in petitioners' opening brief make clear that this standard governs even when the costs of current maintenance would otherwise be absorbed by the state, at no charge to the beneficiary. Pet'r Br. at 32-33. That is the general principle for which the Rulings are cited, and respondents' purported distinctions do nothing to undermine that principle. Nor is it correct, as respondents argue, that the rulings are not entitled to deference because they are "merely ruling letters", not subject to notice and comment. Resp't Br. at 46. The Court settled this matter in *Barnhart v. Walton*, 122 S. Ct. 1265, 1271 (2002), deferring to a Social Security Ruling and explaining that the "fact that the Agency previously reached its interpretation through means less formal than 'notice and comment' rulemaking does not auto-

matically deprive that interpretation of the judicial deference otherwise its due". (Citation omitted.)

3. Both respondents and the Washington Supreme Court also place entirely undue emphasis on the fact that DSHS employs reimbursement accounting, using social security benefits to pay for the cost of maintenance two or three months after foster care services are provided. Resp't Br. at 23; App. Pet. at 19, 28. As the trial court found, the Department does have a reimbursement process, "but only in the accounting sense". App. Pet. at 61. And nothing in § 405(j) even suggests that any particular accounting method is required or disfavored. As both petitioners and the United States explain, the fact that DSHS uses a reimbursement method of accounting is immaterial to the interests of the beneficiary—though it does have significant advantages for the administration of the social security program. Pet'r Br. at 13-14; Br. United States Amicus Curiae at 27-29.

Moreover, if reimbursement accounting violates § 405(j), the impact would extend far beyond the Department or other state representative payees. Under respondents' theory, a parent could not buy an item for a beneficiary child using the family checking account and later "reimburse" the family account using social security benefits. This would be a special problem for representative payees receiving benefits under Title II, because these benefits are disbursed with a one-month time lag (i.e., January's benefits are issued in early February). *See* POMS GN 02401.001; Br. United States Amicus Curiae at 27. Under respondents' theory, a representative payee could not buy clothing for a beneficiary in January and reimburse himself for the cost of the

clothing when the January benefits arrived in February. There is no reason to think Congress would have intended this counter-intuitive result, and no basis for reading it into § 405(j).

4. Respondents also are mistaken when they argue that state law prohibits the Department from exercising the discretion required of a representative payee by § 405(j). Resp't Br. at 26-27. This argument is based on the same misinterpretation of Washington law as respondents' claim that DSHS is required to "seize" benefits for foster care reimbursement and cannot use benefits for other purposes. *See* B.1 *supra* pp. 2-5. As we previously explained, however, Wash. Rev. Code § 74.13.060(1) and (2) grants the Secretary the discretion to use benefits for personal needs and to reimburse for the cost of foster care, and the record establishes that the Department exercises this discretion.

Respondents' main complaint seems to be that the Department "failed to present any evidence" that it makes a systematic attempt to determine whether beneficiaries need special items such as computers and toys. Resp't Br. at 26.[5] In fact, the Department systematically determines a foster child's more basic special needs. The Department prepares an Individual Service and Safety Plan for each child, addressing the child's needs, where the child should live, and the child's permanent placement. JA at 194, ¶ 9. The foster care a child receives reflects the implementation of that plan. Foster care includes a

[5] The burden is on respondents to establish that the Department does not properly exercise its responsibilities as representative payee. The findings relied on by respondents (App. Pet. at 58-59, ¶ 38-41) only establish a lack of evidence in the record. In other words, respondents failed to carry their burden of proof.

wide range of services. Pet'r Br. at 9. For example, the rate for basic foster care ranges from $366 to $515 per month. But ninety-eight percent of foster children eligible for SSI benefits under Title XVI, 42 U.S.C. §§ 1381 *et seq.*, receive services above and beyond basic foster care. Washington spends an average of $1,776 per month on foster children receiving SSI benefits.[6] Aff. Rosalyn Oreskovich ¶ 3.2 (attached to the Department's Application For Stay). The SSI benefit is only $520 per month. App. Pet. at 50, ¶ 10. So the Department provides SSI beneficiaries with services above and beyond what their social security benefits would pay for.

Moreover, the Department does not use a cookie cutter approach that treats each child the same. The services the Department provides depends on the needs of each child, and these needs will change over time. For example, the cost of care for Nicole B., who received SSI benefits (JA at 215), was $1,806 in March 1997. JA at 392. A year later, her needs had changed and the cost of her care in March 1998 was $1,139. JA at 394. Likewise, the cost of care for Jasmine C., who also received SSI benefits (JA at 228), changed from $874 in March 1997 (JA at 395), to $648 a year later. JA at 397. The Department tailors foster care to the needs of the individual child.

[6] Respondents claim that the Department only provides seventy percent of the standard income for an SSI child. This is based on the assumption that the only payment made by the Department is a basic foster care payment, for example, $426 per month for an eight year old child. Resp't Br. at 4 n.2. In fact, the Department spends an average of $1,776 on foster children receiving SSI benefits.

The main purpose of social security benefits is not to buy the beneficiary computers and toys. It is to address the basic needs of the child. The Department fulfills this purpose when it acts as representative payee exactly as required by § 405(j).

5. Finally, respondents argue that the Department does not, in fact, use the benefits in question to pay for "current maintenance", and instead makes other allegedly inappropriate uses of the benefits. Resp't Br. at 23-26. These claims of accounting irregularities are, of course, irrelevant to the legal question presented in this case. They are also precisely the kind of complaint that is properly handled by the SSA, which, as explained in our opening brief, exercises comprehensive supervision over representative payees. Pet'r Br. at 3-5, 26-27. In any event, however, respondents' allegations are incorrect.

(a) It is not the case that the Department uses social security benefits to pay programmatic expenses. Resp't Br. at 7-8, 23. The trial court found that the Department uses the benefits in question to pay for current care and special needs (App. Pet. at 55-58, ¶ 25-37), and there is no finding that the benefits are used to pay programmatic expenses. Nor, as respondents mistakenly believe, do the service codes on the "T" Payment Code List[7] reflect payments for programmatic costs. Resp't Br. at 7-8. The only costs that the Department will pay for with social security benefits are service codes listed on the T List. None of the listed codes are for programatic

[7] The T list is in the Joint Appendix at pages 404-06. However, it was misprinted, so an accurate copy is attached to this brief as Appendix A.

expenses of the Department. For example, service code #3210 is the code for basic foster care. Though the code description refers generally to "case management services", as respondents emphasize (Resp't Br. at 7), the only payments *actually authorized* under the code are for room, board, clothing, and personal expenses—that is, for current maintenance. One example makes the point: Basic foster care for an eight year old under code #3210 is $418.44. This includes $328.02 for room and board, $36.40 for clothing, and $54.02 for personal allowance—which leaves nothing for programmatic costs. JA at 422-23. All of the $418.44 payment is sent to the foster parent, and none goes to cover the Department's administrative expenses.

In fact, service codes that involve programmatic costs are not on the T List at all, and social security benefits may not be used to pay these costs. Examples of these nonreimbursable codes are #3105 (payments to Family Residential Crisis Center to assure the availability of a bed on a twenty-four-hour basis) (JA at 410); #3113 (payments for unfilled slots in a regional crisis residential center) (JA at 412); #3215 (payments authorized when the Department borrows a foster home/bed from a private agency) (JA at 433); and #3241 (payments to receiving home foster parents to assure the availability of a bed on a 24-hour crisis for a child who requires temporary care on short notice) (JA at 462).

All of the social security benefits are used for the needs of the child. The Department does not even take the fee for administrative expenses authorized under social security law. *See* Pet'r Br. at 15.

(b) Respondents also allege that the Department improperly "sweeps" beneficiaries'

accounts. Resp't Br. at 7. Despite the negative connotation of the term, the procedure in question involves nothing more than using a lump-sum payment to pay for past care. Sometimes there is a delay in granting benefits—for example, if benefits are initially denied and the Department successfully appeals, then the SSA grants retroactive benefits. The Department uses those benefits to pay for past care, but only for the months for which the benefits were granted. This procedure is described in detail in petitioner's opening brief. Pet'r Br. at 13-14 & n.11. Despite respondents' suggestions of wrongdoing, the trial court did not find that this perfectly straightforward system violates any social security law or regulation. App. Pet. at 63, ¶ 58. In fact, social security regulations recognize that a retroactive payment of benefits may be used to pay care provided before the benefits are received. 20 C.F.R. § 404.2040(d) (retroactive "benefits due for July 1980 through January 1981" received in February 1981, properly used by representative payee for "maintenance expenses the beneficiary incurred during the period from June 1980 through November 1980").

(c) The Department does not engage in "double dipping" by using social security benefits to reimburse the state for foster care costs already paid by other federal funds. Resp't Br. at 24-25. Though the foster care program does receive other federal funds, social security benefits and those other funds are never used to pay the same expense. *See* Dep. Tamara Erickson at 22 ("No federal agency allows you to receive more than one federal funding source for the same expenditure."). But respondents claim the Department's accounting system results in

double dipping. Finding of fact 88, on which respondents rely entirely for this claim, does not support it. Resp't Br. at 25. That finding states only that the "record does not establish this point or rule it out". App. Pet. at 70-71, ¶ 88. It is not surprising that the record does not address this matter since the legal issue before the court was whether the Department, acting as representative payee, could use social security benefits to pay for the current maintenance of the beneficiary.

(d) The Department has acknowledged that it is possible that child support and social security benefits could inadvertently be used to pay the same foster care expenses. JA at 210, ¶ 7. Respondents, however, greatly exaggerate the impact of this problem when they claim that "the State *likely* recovers its costs twice when it uses Social Security benefits to repay foster care expenditures already paid from parental support". Resp't Br. at 25 (emphasis added). The trial court found only that the "state *may* experience a double payment". App. Pet. at 69, ¶ 82. The trial court's finding that a double payment is only a possibility is fully consistent with the record in this case. Nineteen of the children in the fifty random samples in the record of this case received child support. But there is no proof that there was any double payment of foster care expenses. JA at 133, ¶ 10; 210-11, ¶ 8. A double payment is very unlikely because the cost of foster care exceeds the total amount of social security benefits and child support, so that even if both are applied to the same expenses, the state must still make up the difference. JA at 210-11, ¶ 8. In any event, the Department is working to protect

against even the remote possibility of a problem. JA at 211, ¶ 9.

In summary, the Department does not violate § 405(j). Consistent with Washington law, the Department uses the benefits for the beneficiary's current care and special needs. And although respondents claim the Department uses the benefits improperly, respondents failed to prove those claims before the trial court. In any event, these alleged irregularities are irrelevant to the question presented in this case and are properly the responsibility of the SSA, which supervises representative payees.

D. Conclusion

For the forgoing reasons, and those stated in petitioners' opening brief, the judgment of the Washington Supreme Court should be reversed.

Respectfully submitted,

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November 2002

Appendix A

"T-List" of Reimbursable Expenses

TRSTFUND MAINTIAN TRUST FUND TABLE TRSTFUND TRSTLST

Sel	Srvc	Sel	Srvc	Sel	Srvc	Sel	Srvc
_	_2801	_	_2804	_	_2805	_	_2807
_	_2808	_	_2810	_	_2826	_	_2827
_	_2828	_	_2829	_	_2830	_	_2831
_	_2832	_	_2833	_	_2834	_	_2835
_	_2836	_	_2837	_	_2838	_	_2873
_	_2874	_	_3101	_	_3104	_	_3114
_	_3115	_	_3201	_	_3202	_	_3203
_	_3210	_	_3211	_	_3212	_	_3216
_	_3217	_	_3218	_	_3219	_	_3223
_	_3224	_	_3225	_	_3232	_	_3233
_	_3234	_	_3235	_	_3301	_	_3302
_	_3406	_	_3410	_	_3412	_	_3415
_	_3418	_	_3423	_	_3425	_	_3433
_	_3435	_	_3441	_	_3442	_	_3443
_	_3444	_	_3447	_	_3448	_	_3450

Options: C = Create R = Review U = Update D = Delete

TRSTFUND MAINTIAN TRUST FUND TABLE TRSTFUND TRSTLST

Sel	Srvc	Sel	Srvc	Sel	Srvc	Sel	Srvc
_	_3452	_	_3453	_	_3454	_	_3455
_	_3456	_	_3457	_	_3458	_	_3459
_	_3460	_	_3461	_	_3462	_	_3470
_	_3476	_	_3477	_	_3494	_	_3495
_	_3901	_	_3902	_	_4940	_	92801
_	92804	_	92805	_	92807	_	92808
_	92810	_	92826	_	92827	_	92828
_	92829	_	92830	_	92831	_	92832
_	92833	_	92834	_	92835	_	92836
_	92837	_	92838	_	92873	_	92874
_	93101	_	93104	_	93114	_	93115
_	93201	_	93202	_	93203	_	93210
_	93211	_	93212	_	93216	_	93218
_	93219	_	93223	_	93224	_	93225
_	93232	_	93233	_	93234	_	93235

Options: C = Create R = Review U = Update D = Delete

TRSTFUND MAINTIAN TRUST FUND TABLE TRSTFUND TRSTLST

Sel	Srvc	Sel	Srvc	Sel	Srvc	Sel	Srvc
	93301		93406		93410		93412
_	93415	_	93418	_	93423	_	93425
_	93433	_	93435	_	93441	_	93442
_	93443	_	93444	_	93447	_	93448
_	93450	_	93452	_	93453	_	93454
_	93455	_	93456	_	93457	_	93458
_	93459	_	93460	_	93461	_	93462
_	93476	_	93477	_	93494	_	93495
_	93901	_	93902	_	94940	_	
_	_____	_	_____	_	_____	_	_____
_	_____	_	_____	_	_____	_	_____
_	_____	_	_____	_	_____	_	_____
_	_____	_	_____	_	_____	_	_____
_	_____	_	_____	_	_____	_	_____
_	_____	_	_____	_	_____	_	_____
_	_____	_	_____	_	_____	_	_____

Options: C = Create R = Review U = Update D = Delete

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